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No. 85-118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD J. TRUMP, et al.,

Appellants,

— against —

RODERICK CHU, Individually and as Commissioner of the New York State Tax Commission,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Questions Presented

1. Whether appellants have raised a substantial federal question that N.Y. Tax Law, Article 31-B, imposing a gains tax on the transfer of certain realty for a consideration of one million dollars or more, violates the equal protection clause?

2. Whether appellants have raised a substantial federal question that the classifications under Article 31-B between sales pursuant to a condominium or cooperative plan and those of subdivided parcels improved with residences constitutes a violation of the equal protection clause?

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RODERICK CHU, Individually and as Commissioner of the New York State Tax Commission,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
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MOTION TO DISMISS OR AFFIRM

Appellee, Roderick Chu, Commissioner of the New York State Tax Commission, moves to dismiss or affirm on the ground that this appeal fails to present a substantial federal question and the decision of the court below is so obviously correct as to warrant no further review.

Statement of the Case

The appellee adopts and relies on the facts and statutory analysis of the majority opinion below in the New York Court of Appeals. (1a-8a)*.

* References to pages in the appendix to the Jurisdictional Statement are indicated as (—a).

Argument

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The New York Court of Appeals was correct in holding that the tax classification under N.Y. Tax Law, Article 31-B (McKinney 1975, as amended), is a rational one in conformity with constitutional requirements of equal protection. In so holding, the court broke no new ground, but simply applied the long standing principle of constitutional law enunciated on numerous occasions by this Court that " 'legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.' " *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 [1983]); *accord Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-527 (1959). The decision below conflicts with no decision of this Court and, as found below, is readily distinguishable from the principal case relied upon by appellant, *Stewart Dry Goods v. Lewis*, 294 U.S. 550 (1935).

a. *The Million Dollar Threshold of N.Y. Tax Law, Article 31-B Rests On A Rational Basis.*

In an equal protection challenge to a tax statute, the plaintiff has the heavy burden of "negat[ing] every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). So long as there is a "conceivable" basis for the tax classification — whether articulated by the legislature or not — and the question is one at least debatable, the tax law must be upheld. *Western & Southern Life Insurance v. Board of Equalization*, 451 U.S. 648, 674 (1981) (citing *United States v. Carolene Products*, 304 U.S. 144, 154 (1938]); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981). Further, in examining a particular statute, the courts may not assume that the legislature "was not aware of facts which afford a reasonable

basis for its actions," *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509-510 (1937), nor are state defendants "required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Cremery*, 449 U.S. at 464. Rather, appellants bear the burden of proving the legislature acted irrationally.

In this case, the million dollar threshold contained in Article 31-B merely sets the "parameters of the class of property subject to the tax." (17-a.) Real property sold for a consideration of one million dollars or more is subject to taxation under Article 31-B only in the event there is a gain accruing to the seller. If there is a gain, the tax is imposed uniformly only on the gain, not on the gross consideration. If there is no gain, there is no tax. The million dollar threshold is similar in principle to every state or federal tax law containing a classification keyed to monetary value or income.* Monetary classifications in the tax laws are pervasive and consistently have been upheld by this Court.**

As the Court of Appeals found (7a), the threshold here may be based upon a legislative policy to limit the tax's application

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* Two of the best known of such laws are the standard deduction on personal income taxes and the unified credit on estate taxes. Individuals earning less than the standard deduction pay no income tax, whereas those earning more are subject to taxation on all their income. *See, e.g.*, I.R.C. § 1 (1976); N.Y. Tax Law § 362 (McKinney 1975). Likewise, estates below a certain value are not subject to tax. *See, e.g.*, I.R.C. § 2002 (1976); N.Y. Tax Law § 952(b) (estate tax).

** *E.g.*, *Clark v. Titusville*, 184 U.S. 329 (1902) (state occupation license tax that varied according to sales volume upheld); *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898) (upheld inheritance tax which imposed 3% tax on $10,000 estates, but 4% tax on an estate of $10,001); *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912) (state licensing tax on hand laundries not a denial of equal protection even where steam laundries with larger sales volume paid a lesser tax); *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61 (1913) (upheld $1,000 tax on theatres charging one dollar or more admission but only $400 tax where admission less than one dollar, even though higher admission may have generated less revenue).

to monetarily substantial transactions, where a greater absolute gain is more likely and where the seller may be better able to absorb an additional tax burden. Such an economic consideration is itself sufficient to support the classification. *See Fox v. Standard Oil Co.*, 294 U.S. 87, 100(1935) ("the state may tax the large chains more heavily than the small ones..."). The statutory threshold may also be based upon the cost and difficulty of administering and collecting such a tax for all real estate transactions, no matter how small. A separate gains tax on all real estate transactions without regard to the value of consideration could generate administrative problems, particularly because a deed cannot be filed until it is determined no tax is owed or the tax owed has been paid. This factor in and of itself is also sufficient to uphold the classification here as rational. *See Fernandez v. Wiener*, 326 U.S. 340 (1945); *New York Rapid Transit Corp v. City of New York*, 303 U.S. 573 (1938); *Carmichael v. Southern Coal Co.*, 301 U.S. at 511; *People ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907), *affg*, 184 N.Y. 431 (1906).

The appellants' assertion (J.S.8)* that some real property owners who sell property for less than one million dollars may have gains and yet pay no gains transfer tax is irrelevant to the constitutional issues here.** This Court has repeatedly held that in determining what transactions are taxable, "rational distinctions may be made with substantially less than mathematical exactitude" without offending the equal protection clause. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *accord Kahn*

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* References to pages in the Jurisdictional Statement are indicated as (J.S.-).

** The appellants also argue (J.S.9-10) that under Article 31-B a tax may be imposed even though the transferor realizes no economic profit because the statute fails to consider so-called "soft costs" as reducing any "gain." The court below properly rejected this argument, and stated that relevant tax regulations implementing Article 31-B make provision for the deduction of "all customary, reasonable and necessary costs" thus assuring that a tax will be imposed only where a transaction results in a net gain. *See* 20 N.Y.C.R.R. 590.

v. Shevin, 416 U.S. 351 (1973); *Lehnhausen v. Lake Shore Auto Parts; Dandridge v. Williams*, 397 U.S. 471, 485 (1974).* Indeed, in establishing classifications, "every line drawn by a legislature leaves out some that might well have been included. That exercise of discretion, however, is a legislative, not a judicial function." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). Nearly a century ago, this Court stated that in taxation "the rule of equality permits many practical inequalities and necessarily so. In a classification for governmental purposes, there cannot be an exact exclusion or inclusion of persons and things." *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 296 (1897). Consequently, equal protection "does not require ... exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances." *Id* at 300. Here, appellant has utterly failed to show any respect in which Article 31-B is "utterly invidious" or "palpably arbitrary". *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. at 359-360.

Appellant's reliance upon *Stewart Dry Goods v. Lewis* is misplaced, as the Court of Appeals correctly noted. (5a-6a). *Stewart* concerned recurring gross receipts taxes, imposed irrespective of gains, rather than, as here, a one-time transfer tax imposed only if there is a gain. A gross receipts tax, unlike a gains tax, is measured by sales rather than any profit derived from sales. Such a tax reaches back and is imposed upon each sale, beginning with "dollar one." The transfer tax under Article 31-B, on the other hand, does not reach back and is not imposed upon the gross consideration of the real property transfer; it is a tax imposed only on the gain and is measured only as a flat percentage of the gain. Further, in *Stewart*, unlike the gains tax in Article 31-B, businesses were subjected to increased rates of taxation as their volume of sales increased. Under Article 31-B, a straight ten percent tax is imposed, whether the gain is one dollar or fifty million dollars.

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* *Lehnhausen* also teaches us that even though a tax may "collaterally" impose a heavy burden, or even destroy, a type of occupation or business, this, of itself, does not give rise to a constitutional issue. 410 U.S. at 360.

The appellant's repeated efforts to characterize the gains tax of Article 31-B as a "gross receipts" tax, similar to that in *Stewart*, are without merit. The tax under Article 31-B is not a gross receipts tax because it is based on the *net gain*. This Court in *Stewart* recognized as critical this obvious distinction, as the Court of Appeals noted (5a-6a):

> The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise.

294 U.S. at 558 (quoting *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321, 328 [1918]). This Court in *United States Glue Co.*, cited by *Stewart*, had pointed out why a distinction between a gross receipts tax measured in terms of net gain was needed:

> [A tax upon gross receipts] may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown . . . and the tax cannot be heavy unless the profits are large.

247 U.S. at 328.

The limited application of the *Stewart* case is further explained in *New York Rapid Transit Corp. v. City of New York*. In that case, this Court affirmed the New York Court of Appeals and upheld a gross receipts tax imposed upon "utilities," a classification which by statutory definition included the New York Rapid Transit Corporation. In rejecting the taxpayer's argument (303 U.S. at 581) that the tax was discriminatory because it was less able to pay a gross receipts tax than were other utilities, this Court also rejected the taxpayer's reliance

upon *Stewart*, noting that "the tax held invalid in that case increased in rate with increasing volume" and "[f]or that reason it was thought necessary to inquire whether the tax could be justified as related to ability to pay . . . ." *Id*, 303 U.S. at 583.

Here a flat percentage tax is imposed solely to the extent of the gain, if any. If there is no gain, there is no tax; all taxpayers who transfer property subject to Article 31-B are subject to the same tax rate. The monetary threshold of Article 31-B is rational and raises no substantial federal question.

b) *The Legislative Decision To Tax Substantial Transfers of Realty Pursuant To A Cooperative or Condominium Plan On A Basis Different From Subdivided Parcels Improved With Residences Also Rests On A Rational Basis.*

Appellants' argument that the difference in tax treatment under Article 31-B between realty sold pursuant to a cooperative or condominium plan and subdivided parcels improved with residences raises no substantial federal question. In applying the equal protection clause, this Court has granted state legislatures great leeway in making classification as needed, in their judgment, to produce reasonable and workable systems of taxation. *Western & Southern Life Insurance v. Board of Equalization; Lehnhausen v. Lake Shore Auto Parts; Allied Stores of Ohio v. Bowers*; *Madden v. Kentucky*, 309 U.S. at 88. Moreover, in establishing a tax classification, "even a small difference in the method of conducting business may be availed of by government in imposing different taxes." *Stewart Dry Goods Co. v. Lewis*, 294 U.S. at 565. Unless the difference in tax treatment is "utterly invidious" or "palpably arbitrary," which it is not the case here, the statute must be upheld. *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. at 359-360. Given such wide discretion in determing tax classification, it is no surprise this Court has upheld numerous tax schemes

involving classification which, like Article 31-B, differentiate between similar or related transfers, enterprises or activities.*

In this case, we need look no further than the Consolidated Laws of New York to find a rational distinction between condominium and cooperatives on the one hand and subdivided parcels on the other. Condominiums and cooperatives are creatures of the law. Each has an identity in the law separate from other types of realty. New York statutes contain numerous provisions which distinguish condominiums and cooperatives from other forms of property.** They create a state regulatory

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* *E.g., First Federal Savings & Loan v. Massachusetts Tax Commission*, 437 U.S. 255 (1978) (tax imposed on savings & loan associations but not on credit unions); *United States v. Maryland Savings – Share Insurance Corp.*, 400 U.S. 4 (1970) (upheld tax exemption for certain non-profit corporations organized before Sept. 1, 1957, but not for those thereafter organized); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1958) (storage tax on merchandise but not on property held by nonresidents "for storage only"); *Walters v. City of St. Louis*, 347 U.S. 231 (1954) (tax on gross salaries of employed persons but on net profits of self-employed, no denial of equal protection); *Carmichael v. Southern Coal & Coke Co.* (employers with less than eight employees excluded from tax); *Liggett Co. v. Lee*, 288 U.S. 517 (1933) (tax distinction between wholesalers and retailers); *State Board of Tax Comm. v. Jackson*, 283 U.S. 527 (1931) (tax imposed on chain store and not on competing department store, even though latter had more sales); *Heisler v. Thomas Coiliery Co.*, 260 U.S. 245 (1922) (tax on anthracite but not on bituminous coal); *Armour & Co. v. Virginia*, 246 U.S. 1 (1918) (tax distinction between manufacturer selling own product and merchants selling same product); *Brown-Foreman v. Kentucky*, 217 U.S. 563 (1910) (tax on blended but not on unblended whisky); *Metropolitan Street Ry. Co. v. New York State Bd. of Tax Commissioners*, 199 U.S. 1 (1905) (upheld tax distinction between surface street railroad and sub-surface railroad).

** *See, e.g.*, N.Y. General Business Law, Article 23-A (Mckinney 1968) (Martin Act regulating offering and sale of condominiums and cooperatives: formation, organization and review by Attorney General); N.Y. Real Property Law, Article 9-B (McKinney 1968) (Condominium Act); *see, also*, N.Y. General Obligations Law, §5-501(3) (McKinney 1978) (issuance of securities as to cooperatives); N.Y. Tax Law, § 360(12) (McKinney 1975) (definition of personal income as to cooperative apartment owner); General Obligations Law, § 5-601 (escrow accounts); Real Property Law, § 254-b (McKinney 1968) (limitation on late charges re financing of cooperative); Real Property Tax Law, § 580 (McKinney 1972) (assessment of property owned by cooperative or condominium).

role in the offering of such properties for the New York Attorney's General's office (which is not the case with the sale of other types of residences such as single-family homes).

The clear distinction the law makes between condominiums and cooperatives, on the one hand, and other types of property is *per se* sufficient to justify the challenged classification. *See First Federal Savings & Loan v. Massachusetts Tax Commission*, 437 U.S. 255 (1978)(tax distinction between credit unions and savings and loan associations based, in part, on different treatment under non-tax statutes); *Lehnhausen v. Lake Shore Auto Parts* (distinction for tax purposes between corporate entities and individuals); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. at 578-580 (tax on "utilities" upheld, in part, as recognizable class because of special treatment under existing regulatory scheme); *Lawrence v. State Tax Commission*, 286 US 276, 284 (1932) (rational consideration for classification based, in part, on historical distinction in tax law). How the legislature chooses to tax according to this distinction (taxing only one class, taxing both at the same or equal rates, taxing neither, etc.) is a purely legislative matter which does not implicate equal protection considerations.

Apart from these distinctions found in the law itself, it is evident, as the court below found (14a-15a), that any one of a number of other considerations constitutes a sufficient basis. *See Quong Wing v. Kirkendall*, 223 U.S. 59, 62 (1912) (*Holmes*, J.) (revenue measure may effectuate legitimate state purpose by "favor[ing] certain industries or forms of industry" over others). The Legislature may well have believed (a) that the private home building industry, because of a long-term recession in that market, should not be burdened with an additional tax which might discourage construction of needed moderate-cost residential housing; (b) that New York's rental apartment market could be adversely affected by an additional tax, whereas its vital condominium and cooperative market can more readily cope with such an economic burden; (c) that state taxing policy is an appropriate way to moderate the rapid conversion of scarce

rental apartments to cooperatives and condominiums; (d) that condominium and cooperative developments involve greater administrative costs to state government as a result of special laws, regulations and inquiries which do not apply to other forms of property; (e) that condominium and cooperative apartments, predominantly in urban areas of the state, make greater demands on needed government services than do other types of real estate; and (f), that treating condominium and cooperative sales under Article 31-B as separate tax transactions would create administrative difficulties and additional costs in the collection of the tax.* Although the appellants may seek to debate the judgment of the legislature in creating a tax classification based upon any one or more of these factors, they have utterly failed to demonstrate that classification totally lacks support by any "conceivable" rational basis.

Thus, the decision below upholding the constitutional validity of Tax Law, Article 31-B raises no substantial federal question. Appellants cannot show that either the monetary threshold or the difference in tax treatment between types of real estate was indubitably irrational. On the contrary, as the Court of Appeals found, both classifications are reasonably related to valid state interests.

* This is especially so in cooperative conversions, where the transferee is generally a cooperative apartment corporation which issues shares in the corporation (and does not grant a deed) to the cooperators.

CONCLUSION

As Appellants Have Failed To Raise A Substantial Federal Question, This Court Should Dismiss The Appeal Or Affirm

Dated: New York, New York
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